

Robert J. Zohlmann, Esq. AZ Bar No. 019378
P.O. Box 1833, Tombstone, AZ 85638
(520) 366-7657
Attorney for DEFENDANT

IN THE MAGISTRATE COURT
TOMBSTONE, ARIZONA

STATE OF ARIZONA,

Plaintiff,

Case No. TR2019000043

-vs-

JACK FEATHER,

Defendant.

**MOTION TO DISQUALIFY THE
TOMBSTONE CITY ATTORNEY AND
HIS CONTRACTED STAFF FROM
FURTHER PROSECUTION OF THIS
CASE AND FOR AN ORDER
DISMISSING ALL PENDING
CHARGES**

(Evidentiary Hearing Requested)

Comes now your Defendant, JACK FEATHER, by and through counsel undersigned, and he moves this court for the following relief;

1. For an Order disqualifying the Tombstone City Attorney and his contracted prosecutor from further participation in the prosecution of this criminal case because the Tombstone Code of Ordinances does not authorize said attorneys to prosecute State criminal cases and because no such power has been conferred upon the City or its attorney by the Cochise County Attorney; and
2. For dismissal of the instant charges as the City of Tombstone has, by and through its agent City Attorney P. Randall Bays and his contracted assistant, Roger H. Contreras, unlawfully pursued and is unlawfully pursuing prosecution of this Defendant, and others, by exceeding its authority and by usurping the powers of the Cochise County Attorney who has exclusive statutory authority to prosecute criminal charges, including those occurring in the City of Tombstone.

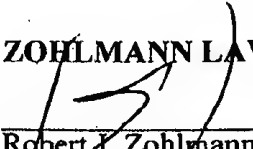
E-Max

9-3-19

Said motion is based upon the files, records and proceedings herein, U.S. Const. Amend. XIV and V, Ariz. Const. Art. 2 § 4 A.R.S. 121-532, Tombstone Code of Ordinances Chapter 7, §§ 1-7-1 through 1-7-16, and the attached memorandum of Points and Authorities.

Dated: August 15, 2019

ZOHLMANN LAW OFFICES


Robert J. Zohlmann
Attorney for Defendant
P.O. Box 1833
Tombstone, AZ 85638
(520) 366-7657

MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

The caption in this case alleges that Mr. Feather is a party to a prosecution of a crime and that the State is the prosecuting party. *See*, Exh. 1, attached. The City of Tombstone is not a party to the prosecution. The City, through its City Attorney, P. Randall Bays has authorized a private lawyer, Mr. Roger Contreras, to prosecute this case as well as all criminal charges arising from offenses alleged to have occurred in the city. Neither Mr. Bays nor Mr. Contreras has been designated a Special Cochise County Attorney. The City Ordinances of Tombstone do not confer prosecutorial power in such cases to either Mr. Bays or Mr. Contreras and the City Ordinances do not provide for the position of City Prosecutor. Despite this, Mr. Contreras claims to be the "Tombstone City Prosecutor." *See*, Exh. 1.

The County Attorney of Cochise County is Brian McIntyre, who is the sole elected official possessing the power and the responsibility to prosecute crimes in all courts in this county. Neither Mr. McIntyre nor any of his deputies are participating in the prosecution of this case or supervising its prosecution.

II. FACT BACKGROUND AND PROCEDURAL HISTORY

On February 3, 2019, Mr. Feather was operating a motor vehicle within the city limits of Tombstone, Arizona, which is located in Cochise County, Arizona. Mr. Feather was stopped and arrested by Tombstone Deputy Marshal Robert Valenzuela and he subsequently was charged with DUI to the slightest degree and DUI above .08.

Deputy Marshal Valenzuela prepared and served upon Mr. Feather a City of Tombstone Marshal's Department criminal complaint which required Mr. Feather to appear before this Court. Pursuant to Rule 6.3 (a) Ariz. R. Crim. P., the undersigned filed with this Court his Notice of Appearance and Not Guilty plea. This matter then was scheduled for a Pretrial Conference.

The Cochise County Attorney did not attend the Pretrial Conference. Instead, the prosecution was presented by one Roger Contreras, a contracted "prosecutor" answering only to the Tombstone City Attorney, P. Randall Bays, the mayor or the common council. Prosecution by these attorneys continues, on this and many other criminal cases presented before this Court. Neither Mr. Contreras nor the city attorney, Bays, is an Assistant Cochise County Attorney and neither has been authorized by the Cochise County Attorney to prosecute cases on its behalf and the City of Tombstone Ordinances do not provide for either of them to exercise prosecutorial power or discretion.

Mr. Feather concedes that, due to concurrent jurisdiction of the Justice Court Precinct 1 and this Court to preside over criminal charges alleged to have been committed within the Tombstone city limits, nothing in this motion challenges this Court's jurisdiction. However, and as is argued below, neither the city attorney nor his designated "prosecutor" have any authority whatsoever to prosecute such cases.

Mr. Feather moves this Court to disqualify the Tombstone City Attorney and his contracted staff from further participation in the prosecution of this criminal case and for dismissal of the instant charges because the City of Tombstone has unlawfully pursued and is unlawfully pursuing prosecution of this Defendant, and others, in violation of their due process rights.

III. DISCUSSION AND POINTS AND AUTHORITIES

It is beyond argument that each and every criminal defendant enjoys a right to due process in his prosecution. Due process is defined as the assurance that all persons in the United States and its states that no one may be deprived of life, liberty, or property without due process of law. U.S. Const. Amend. V and XIV, Ariz. Const. Art. 2, § 4. Our Arizona Constitution and laws vest in the elected county attorney the power to represent the public's interest in the prosecution of criminal charges Ariz. Const. Art. 12, § 8; *see*. A.R.S. §532 (A) (2017). Indeed, it is the power and responsibility that elected county attorneys shall prosecute crimes in their counties. That section 11-532 of Arizona Revised Statutes makes it clear that;

"11-532. Powers and duties; definition

A. The county attorney is the public prosecutor of the county and *shall*:

1. Attend the superior and *other courts within the county* and conduct, on behalf of the state, all prosecutions for public offenses**** *Id.* [emphasis supplied]

In the instant case, neither the city attorney nor his contract assistant have been authorized by the elected county attorney to prosecute any criminal cases brought in the name of the State of Arizona in the City Court of Tombstone. Indeed, the Tombstone City Ordinance which authorizes and empowers the city attorney does not authorize a "City Prosecutor," and, by its silence on the issue of the prosecutorial power in state prosecutions, the city codes implicitly recognize that the City of Tombstone does not have the legal authority or power to usurp the County Attorney's prosecution power by appointing its own city prosecutor. The ordinance provides, in its entirety;

1-7-1: APPOINTMENT:

1-7-2: SUITS AND ACTIONS:

1-7-3: JUDGMENTS:

1-7-4: ADVICE:

1-7-5: SPECIAL ASSESSMENTS:

1-7-6: ORDINANCES AND DOCUMENTS:

1-7-1: APPOINTMENT:

The attorney and/or legal advisor shall be appointed by the mayor and council to hold office for the duration of the term of the said appointing authority unless sooner removed by the appointing authority. (1972 Code)

1-7-2: SUITS AND ACTIONS:

The attorney and/or legal advisor shall prosecute or defend any and all suits or actions at law or equity *to which the municipality may be a party*, or in which it may be interested, or which may be brought against, or by, any officer of the municipality on behalf of the municipality, or in the capacity of such person as an officer of the municipality. (1972 Code)

1-7-3: JUDGMENTS:

It shall be the duty of the attorney and/or legal advisor to see to the full enforcement of all judgments or decrees rendered or entered in favor of the municipality and of all similar interlocutory orders. (1972 Code)

1-7-4: ADVICE:

The attorney and/or legal advisor shall be the advisor of the municipality and on legal matters shall render advice on all questions affecting the municipality, whenever requested to do so by any municipal official. Upon request by the mayor or city council, he shall reduce any such opinion to writing. (1972 Code)

1-7-5: SPECIAL ASSESSMENTS:

It shall be the duty of the attorney and/or legal advisor to see to the completion of all special assessment proceedings and condemnation proceedings. (1972 Code)

1-7-6: ORDINANCES AND DOCUMENTS:

It shall be the duty of the attorney and/or legal advisor to draft or supervise the phraseology of any contract, lease or other documents or instruments to which the municipality may be a party; and upon request of the council to draft ordinances covering any subjects within the power of the municipality. (1972 Code)"
Tombstone Code of Ordinances, Ch. 1, sec. 7.

It is clear that the County Attorney has not delegated his prosecution power to the City of Tombstone, Tombstone City Attorney or the private attorney, Mr. Contreras. The Tombstone Ordinances do not empower the City Attorney or any person whom he may designate as a "City Prosecutor." Indeed, what has been happening, and what is happening in this and many other cases, is that the City of Tombstone has hired a "private attorney" to prosecute State crimes occurring in the city and has done so without legal authority, without the approval and/or supervision of the Cochise County Attorney and in violation of the due process rights of Mr. Feather and others.

The current (and past) prosecution structure before this court has created and continues to create serious and fundamental due process violations of persons being

prosecuted in this Court. See, *Erikson v. Pawnee County Bd. Of County Comm'rs*, 55 F.3d 1151, 1154, 854 (10th Cir. 2001); see also, *East v Scott*, 55 F.3d 996, 1000 (5th Cir. 1995), *Pearson v. Miller*, 854 F.2d 656, 662-3 (4th Cir. 1988.)

Simply stated, neither the City Attorney Bays or his contracted "City Prosecutor" have any authority to prosecute anyone for a state crime committed in the city limits or, for that matter, anywhere.

Essentially, the City of Tombstone and its City Attorney have, for many, years, usurped the County Attorney's power and as a result scores, hundreds or perhaps even thousands of persons have been prosecuted by non-elected, private, contracted lawyers in violation of the due process rights of each and every defendant brought before the Tombstone Magistrate Court. This total includes your defendant in this case.

The prosecution of persons by an unauthorized or unsupervised non-government or "private" attorney is not without its dangers. In *State v. Harrington*, 534 S.W.2d 44, 48 (Mo. 1976), that Court found a due process violation where a "private prosecutor" hired by the victim's family was invited "to help prosecute the defendant." The court ruled the procedure was "fundamentally unfair." *Id.*; see *Hughes*, 193 Ariz. at 80, ¶ 33.

The *Harrington* court stated:

"[t]he modern day prosecutor wields the power of the State's investigatory force, decides whom to indict and prosecute, decides what evidence to submit to the court, negotiates the State's position in plea bargaining and recommends punishment to the court. The entry of a private prosecutor into a criminal prosecution exposes all of these areas to prejudicial influence. We consider such exposure intolerable.

534 S.W.2d at 50.

It further has been held by courts that important due-process rights are implicated when an elected prosecutor cedes all control over a prosecution to a private lawyer. See, *Erikson v. Pawnee County Bd. of County Comm'rs*, 263 F.3d 1151, 1154 (10th Cir. 2001); *East v. Scott*, 55 F.3d 996, 1000-01 (5th Cir. 1995); see also *Person v. Miller*, 854 F.2d 656, 662-63 (4th Cir. 1988). Here the elected prosecutor, Mr. McIntyre has not ceded his control over Tombstone prosecutions, but rather is most likely unaware that such prosecutions are taking place *without* his knowledge or approval.

In the usual case, discretionary decision-making inherent in the power to prosecute may not be delegated to unelected private counsel *See, Lindsay R. v. Cohen*, 236 Ariz. 565, 567 (App. 2015). Here, though, the power was never delegated by the County Attorney. It was, basically, a power appropriated by the city and its city attorney.

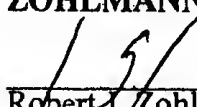
The practice must stop and it must stop here, with the present defendant. This Court is, for the reasons stated above, urged to forthwith disqualify the City Attorney and his contract assistant and dismiss this case with prejudice.

IV. CONCLUSION

The City Attorney and his contracted staff are not empowered by the County Attorney or city ordinance to prosecute cases which occur in Tombstone and which are brought in the name of the State. The City of Tombstone is not empowered to prosecute criminal cases or to authorize the same. The prosecutor in this case should be disqualified and this case should be dismissed.

Dated: August 15, 2019

ZOHLMANN LAW OFFICES



Robert J. Zohlmann
Attorney for Defendant
P.O. Box 1833
Tombstone, AZ 85638
(520) 366-7657